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SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-267

RALPH STEPHENS ..... PETITIONER

VS:

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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SUPREME COURT OF THE UNITED STATES

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RALPH STEPHENS ..... PETITIONER

VS:

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Ralph Stephens, petitioner herein, prays that a writ of certiorari issue to review the opinion of the Court of Appeals of Kentucky rendered March 31, 1975 in the above entitled case, petition for rehearing having been denied and mandate affirming the judgment of the lower court, Montgomery Circuit Court, having been entered May 23, 1975.

OPINION BELOW

The opinion of the Court of Appeals of Kentucky, reported in 522 S.W.2d 181 (1975), is printed as Appendix A attached hereto.

JURISDICTION

On October 7, 1974, petitioner Ralph Stephens was convicted of the offense of feloniously breaking and entering a dwelling house with intent to steal therefrom by a jury in the Montgomery Circuit Court. A timely appeal was taken to the Court of Appeals of Kentucky and on March 21, 1975 the Court of Appeals of Kentucky rendered the opinion printed in Appendix A which petitioner desires this Court to review. A petition for rehearing of the appeal was filed with the Court of Appeals of Kentucky, on April 18, 1975. The petition for rehearing was denied May 23, 1975, with the Court of Appeals of Kentucky affirming the judgment of conviction in the Montgomery Circuit Court and issuing a mandate certifying such order to the Montgomery Circuit Court (Appendix B).

The jurisdiction of this Court is invoked under 28 USC § 1257(3).

QUESTION PRESENTED

Did the Kentucky courts err in permitting the introduction into evidence of a watch and two rings seized pursuant to a search warrant when the watch and rings were not described in the search warrant as required by the Fourth Amendment to the Constitution of the United States, and it was not "immediately apparent" to the searching officers that they had before them incriminating evidence?

CONSTITUTIONAL AMENDMENT INVOLVED

The Fourth Amendment to the Constitution of the United States.

STATEMENT

Ralph Stephens, the petitioner herein, was indicted in the Montgomery Circuit Court, Mt. Sterling, Kentucky, on September 14, 1974, charged with feloniously breaking and entering the dwelling house of Les Branham with intent to steal therefrom in violation of Kentucky Revised Statutes, Section 433.180 (Appendix C). A jury trial in the Montgomery Circuit Court on October 7, 1974 resulted in a jury verdict of guilty and punishment was fixed at confinement in the penitentiary for a period of six years.

After indictment but prior to trial and on October 1, 1974, the petitioner filed in the Montgomery Circuit Court a motion to suppress as evidence (Appendix D) all articles seized under a search warrant dated July 18, 1974 issued from the Rowan Quarterly Court, Morehead, Kentucky (Appendix E) and signed by Calvin R. Lytle, identified as Magistrate, District No. 2, Rowan County, because (1) Calvin R. Lytle as Magistrate, District No. 2, had no authority to issue the search warrant and (2) the articles seized from the residence of the petitioner were not those enumerated and described in the search warrant.

A hearing upon this motion to suppress was held on October 4, 1974 at which the magistrate issuing the search warrant testified as did members of the Kentucky State Police who conducted the search.

The following facts were established by the testimony introduced at this hearing and at the jury trial (Agreed Statement Pursuant to RCr 12.72, Appendix F).

The Kentucky State Police officers testified that a number of articles were seized from the petitioner's resi-

dence pursuant to the search warrant which were not listed or described on the search warrant or the affidavit upon which the search warrant was issued and of these articles a ladies' wrist watch and two ladies' rings were identified by Les Branham at the trial as having been taken from his residence. Nothing listed on the search warrant and affidavit for the search warrant as stolen property was found in petitioner's home or seized pursuant to the search warrant.

The officers further testified that the ladies' watch and two ladies' rings identified by Les Branham as having been stolen from his residence had no unusual or identifying marks on them which would lead the officers to believe them to be stolen and it was only after the watch and two rings were shown to Les Branham days later that the officers had any reason to believe the items might have been stolen.

When this case was called for trial October 7, 1974, the trial court overruled petitioner's motion to suppress the evidence seized under the search warrant of July 8, 1974 and upon the trial of the case permitted, over petitioner's objection, the introduction into evidence of the ladies' wrist watch and two ladies rings seized under the search warrant and later identified by Les Branham as having been taken from his residence.

Without the introduction into evidence of the ladies' wrist watch and two ladies' rings seized under the search warrant, the Commonwealth agreed with petitioner that he would have been entitled to a dircted verdict of not guilty since no other proof was introduced connecting him with the offense alleged in the indictment.

On October 8, 1974, petitioner filed and served a motion and grounds for new trial in the Montgomery Circuit Court assigning among other errors that the trial court erred in failing to suppress the evidence seized under the search warrant dated July 18, 1974 due to the illegal search and seizure conducted at petitioner's home. The trial court overruled petitioner's motion and grounds for a new trial and entered judgment against him pursuant to the jury verdict (Appendix G).

On October 31, 1974, petitioner filed his notice of appeal to the Court of Appeals of Kentucky. The petitioner on appeal raised three issues before the Court of Appeals of Kentucky. (1) Did Calvin R. Lytle as Magistrate, District No. 2, Rowan County, Kentucky, have the legal authority to sign a search warrant issued from the Rowan Quarterly Court?

(2) Did Magistrate Lytle's lack of comprehension of "probable cause" in issuing the search warrant, deprive petitioner of his protection against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and Section 10 of the Constitution of Kentucky?

(3) Did the trial court err in permitting the introduction into evidence of the watch and two rings seized pursuant to the search warrant when the property seized was not described in the search warrant and it was not "immediately apparent" to the searching officers that they had before them incriminating evidence?

The Court of Appeals of Kentucky ignoring federal precedent, including opinions of this Court to the contrary

on issue 3, upheld the trial court on all three issues and on March 21, 1975, rendered its opinion affirming the judgment of the trial court (Appendix A).

Petitioner next filed a petition for rehearing in the Court of Appeals of Kentucky on April 18, 1975, which was denied May 23, 1975 (Appendix B).

GROUNDS FOR CERTIORARI

1. This petition involves a unique situation arising under the Fourth Amendment to the Constitution of the United States:

> May police officers searching a residence pursuant to a search warrant which describes certain things seize other things not described in the warrant where none of the things described is seized, no arrest is made and it is not immediately apparent to the searching officers that the things seized are contraband, stolen property or otherwise illegally possessed by the homeowner?

Although this court has not ruled directly upon this factual situation, opinions in related matters indicate that such seizure is illegal as violating the homeowner's constitutional rights protected by the Fourth Amendment. It is important that this specific question be decided.

2. The Court of Appeals of Kentucky in holding that such seizure was legal has failed to follow the precedents of this Court as stated in *Marron* v. *United States*, 275 U.S. 192, 72 L.Ed. 231, 48 S.Ct. 74 (1927); *Stanley* v. *Georgia*, 394 U.S. 557, 22 L.Ed. 2d 542, 89 S.Ct. 1243

(1969) and *Coolidge* v. *New Hampshire,* 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971), thus depriving petitioner of his constitutional rights.

ARGUMENT

THE COURT OF APPEALS OF KENTUCKY ERRED IN ITS OPINION APPROVING THE ACTION OF THE TRIAL COURT IN PERMITTING THE INTRODUCTION INTO EVIDENCE OF THE WATCH AND TWO RINGS SEIZED PURSUANT TO THE SEARCH WARRANT WHEN NO ITEMS DESCRIBED IN THE SEARCH WARRANT WERE FOUND OR SEIZED, THE WATCH AND TWO RINGS WERE NOT DESCRIBED IN THE SEARCH WARRANT AND IT WAS NOT "IMMEDIATELY APPARENT" TO THE OFFICERS SEIZING THE WATCH AND TWO RINGS THAT THEY HAD INCRIMINATING EVIDENCE BEFORE THEM.

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing the* place to be searched, and the persons or *things to be seized,*" (Emphasis ours)

This constitutional protection of the citizens against unreasonable searches and seizures applies in state court proceedings. *Mapp* v. *Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961).

The Fourth Amendment requires that search warrants particularly describe the things directed to be seized

as indicated by *Marron* v. *United States*, 275 U.S. 192 (1926), 72 L.Ed. 231, 48 S.Ct. 74 (1927):

> "The requirement that warrants shall particularly describe the things to be seized makes general seizures under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

The search warrant in this case directed an immediate search of petitioner's residence described in detail and a Buick automobile (described by license number) for the following personal property: "One 400 lb. floor safe, brand unknown, one muzzle loading rifle, one Westfield .20 ga. pump shotgun, one Golden Spike Winchester .30 .30 rifle, one 22 cal. Winchester magnum rifle, one Mossenburg & Sons .12 ga. single barrel lever action shotgun, one Hopkins and Allen .12 ga. single barrel shotgun, one Little Scout .22 cal. rifle, one Springfield .22 cal. rifle, one Marlin .22 cal. rifle, one Smith & Wesson .357 magnum revolver, serial No. 8049, one Smith & Wesson .38 cal. snub-nosed revolver, serial No. J57403, 6 men's suits, assorted colors and sizes, rare type coins ranging from pennies to silver dollars." (AppendixE).

The affidavit upon which the search warrant was issued described the same articles as listed upon the search warrant and stated that they had been stolen from the residence of Les Branham on April 7, 1974. The return on the search warrant merely recited: "Executed this 18th

day of July, 1974 by searching the within named premises, including the within named automobile. Several burglarious tools were found in the front and rear of said automobile and seized.

/s/ C.A. Thomas
Det. Sgt. C.A. Thomas, KSP"
(Appendix E)

Justice Pleas Jones, writing the opinion of the Court of Appeals of Kentucky in this case, disposed of petitioner's complaint as to the illegality of the seizure of the watch and two rings introduced into evidence as follows:

> "Finally, Stephens attacks the sufficiency of the search warrant because it did not describe the ladies' watch and two rings admitted into evidence. The search warrant described with particularity that 'coins ranging from pennies to silver dollars' had been taken from the house of Les Branham. In obedience to the command of the warrant, the officer took a metal box that was concealed in a hole in the wall. It was not likely that pennies or silver dollars would be laid end to end on a rafter. The most likely place for the containment of coins, watches, rings, and knives, would be a metal box. The box contained two rings and a ladies' watch which belonged to Branham. He did not identify the coins as those taken from him. Although the watch and rings were not specified in the search warrant, they were identified as items that had been stolen from the Branham home. Their

seizure and introduction into evidence was legal." (Appendix A).

After citing *Jones* v. *Commonwealth,* Ky., 416 S.W. 2d 342 (1967) as authority for the foregoing conclusion, the opinion continued:

> "The metal box, nestled among the cobwebs in the rafters, contained: 27 men's wrist watches, 38 ladies' wrist watches, 7 pocket knives, 7 men's rings, 22 ladies rings, 6 gold chains, 5 watch bands, 1 gold belt buckle and various other items. (Appendix A)

While the opinion of the Court of Appeals of Kentucky made no mention of the requirement of the Fourth Amendment to the United States Constitution and a similar requirement in Section 10 of the Constitution of Kentucky, which require search warrants to particularly describe the things to be seized, it appears that the Court attempted to avoid these constitutional protections and write around them by quoting from *Jones* v. *Commonwealth,* supra, as follows:

> *** "While engaged in a legitimate search under a search warrant describing specific articles, it is proper to seize stolen or contraband property or property constituting the fruits of the crime or instrumentalities of the crime, though the latter are not described in the warrant."

Jones, supra, was a companion case to *Bond* v. *Commonwealth,* Ky., 414 S.W. 2d 131 (1967) earlier decided. In *Bond,* supra, the search warrant directed the seizure of "any clothing, bed clothing, or articles containing blood

or signs of blood." Seized were a number of bloodstained articles of clothing and a small metal box containing an assortment of hand tools. The Court of Appeals of Kentucky held that the seizure of the tools were authorized under the wording of the search warrant since some of the tools had a rusty, red color which may have been bloodstains. In *Jones,* supra, the Court of Appeals of Kentucky held that the question of admissibility into evidence of the articles seized under the search warrant had been decided in favor of admissibility in *Bond,* supra. However, the opinion went on gratuitiously to set out the paragraph quoted above and cited in support of the statement *Harris* v. *United States,* 331 U.S. 145. 91 L.Ed. 1399, 67 S. Ct. 1098 (1946), and *Woo Lai Chun* v. *United States,* 274 F. 2d 708, (9th Cir. 1960).

The quotation from *Jones* v. *Commonwealth,* supra, does not make it clear that property not described in the search warrant may be seized, although none of the property described is seized.

Harris, supra, cited in support of *Jones,* supra, affords respondent no support because in that case the search was made incident to an arrest and since the search disclosed draft cards, immediately apparent as stolen, a crime was committed in the presence of the searching officers. In this case, *Harris,* supra, does not apply because the watch and rings were not seized incident to an arrest but were seized under a search warrant at a time when the seizing officer did not know they were stolen.

Nor does the opinion of the Court of Appeals for

the 9th Circuit in *Woo Lai Chun*, supra, support the opinion of the Court of Appeals of Kentucky, since in that case the conviction was reversed because certain letters seized during a search pursuant to a search warrant, but not described therein, were erroneously permitted to be introduced into evidence.

Without saying so in so many words, it may be that the Court of Appeals of Kentucky, speaking through Justice Jones, was attempting to justify its ignoring of the plain provisions of the Fourth Amendment to the United States Constitution by invoking the "plain view" doctrine.

In *Coolidge* v. *New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S. Ct. 2022 (1971) this Court discussed at length various situations in which seizures may be legal although there was no valid search warrant describing the articles seized. It is submitted that none of these situations applies to the case at bar. The watch and rings were not seized incident to a lawful arrest. In fact petitioner was not arrested on the breaking and entering charge until July 23, 1974 five days after the seizure of the articles from his residence. (Appendix H).

Nor were the watch and rings in "plain view" as was the marijuana on the kitchen sink in *Ker* v. *California*, 374 U.S. 23, 10 L.Ed. 2d 726, 83 S.Ct. 1623 (1963). They were in a closed metal box upstairs in the residence and were not observed until the residence was searched and the box opened.

Nor was it immediately apparent to the searching officers that the watch and rings were contraband, stolen

property or the fruits of crime. The officers were not able to reach a conclusion that the property was stolen until several days later after identification by the owner. There was nothing distinctive about the watch or rings to immediately indicate ownership. The concurring opinion of Mr. Justice Stewart in *Stanley* v. *Georgia,* 394 U.S. 557, 22 L.Ed. 2d 542, 89 S.Ct. 1243 (1969) holds that articles seized while searching under a valid search warrant may not be seized if further inspection or investigation is necessary to determine that the articles are illegally possessed. In *Stanley,* supra, obscene films were seized but had to be projected upon a screen before the obscenity complained of could be identified and consequently they were not subject to seizure under the search warrant.

Nor were the watch and rings "inadvertently" discovered as happened in the *Harris* v. *United States,* 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968), where the opening of an automobile door to roll up a window disclosed a registration certificate identifying the car as stolen.

Nor is this a case where delay in securing a warrant for the watch and rings presents such an "exigent circumstance" as to justify seizure without a warrant. To quote again from the opinion of the Court of Appeals of Kentucky, the searching officer attempted to justify his actions in seizing the contents of the metal box by saying he knew that watches and knives had been taken from the Branham home. If such was the fact, nothing prevented the police from describing such articles in the affidavit for the search warrant and the warrant itself.

This they did not do. To quote from Coolidge, supra, (403 U.S. 741):

> "If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of 'warrants . . . particularly describing . . . [the] things to be seized.' "

United States v. *Gray*, 484 F.2d 352 (6th Cir. 1973) cert. den. 414 U.S. 1158, an appeal from the United States District Court for the Eastern District of Kentucky, cited *Marron*, supra. The Court went on to say, however, that *Marron* fails to recognize the plain view doctrine, now well established in the law of search and seizure. The opinion then quoted from Mr. Justice Stewart in *Coolidge* v. *New Hampshire*, 403 U.S. 443 at 466, 91, S.Ct. 2022, 29 L.Ed. 2d 564 (1971):

> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of *evidence incriminating the accused*.. The doctrine serves to supplement the prior justification — whether it be a warrant for another object, hot pursuit, search incident to lawful arrest or some other legitimate reason for being present unconnected with a search directed against the accused — and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only when it is *immediately apparent to the police that they have evidence before them*; the 'plain view' doctrine may

not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." (Emphasis added)

In *Gray*, supra. a Kentucky state trooper received information that the operator of a small grocery store in rural Fayette County was selling beer without a license. A plainclothes man purchased several cans of beer, procured a search warrant and the troopers returned to the store to arrest Gray and execute the search warrant which directed the seizure of "any intoxicating liquors, apparatus for manufacturing intoxicating liquors or materials used in the manufacture of intoxicating liquors." After locating and seizing a quantity of beer in a cooler, a trooper proceeded to search the upper level of the building. No alcoholic beverages were found in the upper residence area but while the trooper was conducting the search he noticed two rifles leaning against the wall in an upstairs closet and copied their serial numbers. Hours later the serial numbers were run through the computer of the National Crime Information Center and it was learned that the firearms were stolen in Tennessee. A search warrant was obtained for the rifles, they were seized and Gray was charged with and convicted for violation of the federal firearms law.

The Circuit Court of Appeals in reversing the conviction, held that when the facts were analyzed under the plain view doctrine, the seizure of the rifles could not be justified. In discussing the plain view doctrine, the Court said that the first prong of the doctrine must be a prior justification for an intrustion, in that case a legitimate search warrant. The Court went on to hold:

"The second prong of the doctrine requires that

during the search the officers 'came indavertently across a piece of evidence incriminating the accused'. Further 'the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them.' Here, Officer Brodt inadvertently discovered the rifles in the upstairs clothes closet while searching for alcoholic beverages but it was not 'immediately apparent that the rifles were evidence incriminating the accused.' The rifles were not contraband; there was no nexus between the rifles and the crimes of selling or possessing intoxicating liquor without a license; nor did the officers at that time have any knowledge that the rifles were evidence of any other crimes. It was only after Trooper Brodt had seized the weapons, copied down the serial numbers, left the defendant's premises, and then run the information taken off the rifles through the National Crime Information Center that he learned that they were stolen and hence incriminating. This can hardly be characterized as being 'immediately apparent.' To allow the police to seize objects, unincriminating at the time of seizure, would not in our view comport with the plain view doctrine."

An identical factual situation exists in the case at bar. The watch and two rings seized were not listed in the search warrant, and they were not identified as being stolen until some time later when they were exhibited to Les Branham. Consequently, at the time the watch and rings were seized, it was not "immediately apparent" that they were "evidence incriminating the accused." The only

reason advanced by the officer seizing the watch and rings was:

"Q. Can you point to one single item that made you think it was taken from the Branham residence other than the fact it was concealed?

A. That . . . the fact that it was concealed, there were watches in there, there was knives in there, I knew that there had been some watches taken, I believe there had been some knives taken also from the Branham home, and that was the reason we was there, to look for those items stolen from his home." (Appendix A)

Since none of the items described in the search warrant as having been stolen from the Branham home was found in the Stephens residence, and since there was no identification of any kind upon any of the articles in the metal box to conect them with Branham, surely the suspicion on the part of the searching officer was not sufficient to convert the articles in the metal box into "incriminating evidence".

It may be noted that all of the other items seized from appellant's home have been returned to the petitioner with the exception of a watch which has not been identified as stolen property.

No property described in the search warrant was seized by the officers raiding appellant's home and at the time of their seizure it was not immediately apparent to the officers that the watch and two rings were evidence incriminating the accused, thus the search became a general or exploratory one which is prohibited.

Attorneys for petitioner are not advised as to the position of the Attorney General of Kentucky upon the issue presented in this petition since, upon the appeal to the Court of Appeals of Kentucky, the Attorney General admitted error with respect to the first issue raised on appeal which questioned the authority of Calvin R. Lytle as Magistrate, District No. 2, Rowan County, Kentucky to issue a search warrant from the Rowan Quarterly Court. This admission of error on the part of the Attorney General made other issues raised on appeal moot. (Appendix I).

CONCLUSION

There is no intermediate appellate court in Kentucky and the Court of Appeals of Kentucky hands down more opinions annually than any other state court of last resort. The press of time may account for the fact Justice Jones in his opinion in this case dealing with the issue presented here failed to mention the Fourth Amendment to the Constitution of the United States. It may account for the fact that the only citation in support of the court's conclusion that the seizure of the watch and rings was valid, was dictum not supported by the federal cases cited. It may account for the fact that his opinion totally ignored the opinions of this court in *Marron* v. *United States,* 275 U.S. 192, 72 L.Ed. 231, 48 S.Ct. 74 (1927); *Stanley* v. *Georgia,* 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969) and *Coolidge* v. *New Hampshire,* 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971) although attention was invited to them by petitioner's counsel.

It is the hope of petitioner that this Court will not permit further erosion of the rights of the individual pro-

tected by the Fourth Amendment to the United States Constitution. As Mr. Justice Stewart said in *Stanley*, supra:

> "To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant."

We respectfully urge this Court to note probable jurisdiction upon the issue advanced in this petition and to order plenary consideration of this case.

Respectfully submitted,

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COUNSEL FOR PETITIONER

PROOF OF SERVICE

I, Lewis A. White, one of the attorneys for Ralph Stephens, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 18th, 1975 the foregoing Petition for Writ of Certiorari and the Appendix thereto was served upon the respondent, Commonwealth of Kentucky, by mailing three copies to Hon. Ed W. Hancock, Attorney General, Commonwealth of Kentucky, Frankfort, Kentucky 40601, and by mailing three copies to Hon. James E. Clay, Commonwealth Attorney, 21st Judicial District, Morehead, Kentucky 40351, all with postage prepaid.

Lewis A. White

LEWIS A. WHITE JR.

APPENDIX "A"

RENDERED: MARCH 21, 1975

COURT OF APPEALS OF KENTUCKY

FILE NO. 74-1157

RALPH STEPHENS ..... APPELLANT

VS:
APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE CASWELL P. LANE, JUDGE
INDICTMENT NO. 74-53

COMMONWEALTH OF KENTUCKY ..... APPELLEE

OPINION OF THE COURT BY JUSTICE JONES
AFFIRMING

Ralph Stephens was convicted on a charge of dwelling-house breaking. In conformity with the jury's verdict, Stephens was sentenced to 6 years in the state penitentiary.

The record on appeal has been certified to this court pursuant to an agreed statement. RCr 12.72. Stephens presents three questions for this court's consideration. First, he contends that the magistrate of District #2, Rowan County, Kentucky, had no authority to issue a search warrant from the Rowan Quarterly Court. There is no contrariety in the testimony presented on a hearing to suppress the evidence. It is admitted that Calvin R. Lytle, the

APPENDIX "A"

magistrate of District #2, issued the search warrant about which Stephens complains. The search warrant was styled:

> "The Commonwealth of Kentucky
> In The Rowan Quarterly Court
> Of Morehead. Kentucky."

The search warrant described the location of the Ralph Stephens residence. It commanded the officer or officers to search the residence for various weapons, men's suits, and rare-type coins ranging from pennies to silver dollars. The search warrant closed with the following statement:

> "...and if you find same or any part thereof, to bring it forthwith before me or any other court in which the offense in respect to which the property or things taken is triable, or retain such property in your custody subject to the order of such court.
>
> Witness my hand the 18th day of July, 1974.
>
> /s/ Calvin R. Lytle
> Magistrate District
> #2 Rowan Court County."
> Morehead, Kentucky

There is no merit in Stephens' contention that only the county judge of Rowan County, or under certain circumstances, the county judge pro tem of Rowan County, had the legal authority to issue a warrant from the Rowan Quarterly Court, *because we think the warrant was not in fact issued out of the Rowan Quarterly Court.* The warrant was issued by Lytle in his official capacity as a magistrate.

APPENDIX "A"

> "A search warrant my be issued, upon affidavit sufficient under Sec. 10 of the Constitution of Kentucky and sworn to by the issuing officer by a *magistrate,* or by any other officer authorized by statute." RCr 13.10.

Lytle, after signing the warrant a magistrate of District #2, Rowan County, blocked out the word "Judge," with the letter "x." He did the same in the Jurat on the affidavit and signed it as Calvin R. Lytle, Magistrate, District #2, Rowan County, Kentucky. The failure of the magistrate to cross out the words, "In the Rowan Quarterly Court of Morehead, Kentucky," under the designation, "The Commonwealth of Kentucky," did not affect the validity of the warrant.

Next, Stephens attacks the qualifications of Lytle. He contends that the magistrate had no knowledge of the Fourth Amendment of the United States Constitution. He argues also that the magistrate did not understand the meaning of "probable cause." Lytle's testimony reveals that he read both the warrant and the supporting affidavit. He then determined that there was "reasonable cause" to issue the warrant.

Section 10 of the Kentucky Constitution and the Fourth Amendment to the Federal Constitution are practically the same in guaranteeing citizens freedom in their persons, houses, papers and possessions against unreasonable searches and seizures. They each provide that no warrant shall issue for a search except probable cause supported by affidavit.

APPENDIX "A"

It is true that Lytle had not read recent Supreme Court cases dealing with search warrants. He had not committed to memory the Fourth Amendment of the United States Constitution. It is doubtful that he could have recited the Ten Commandments in proper sequence. If these were prerequisites to the qualification of a judicial officer to issue a warrant, the whole process of criminal justice would require restructuring. Magistrate Lytle is a constitutional officer. Sec. 142 Kentucky Constitution. He is authorized to issue search warrants. Magistrate Lytle did not possess a "judicial mind" such as did the eminent jurists Learned Hand and Oliver W. Holmes. However, the evidence convinces this court that he knew what constituted probable cause sufficient for the issual of the warrant.

Finally Stephens attacks the sufficiency of the search warrant because it did not describe the ladies' watch and the two rings admitted in evidence. The search warrant described with particularity that "coins ranging from pennies to silver dollars" had been taken from the house of Les Branham. In obedience to the command of the warrant, the officer took a metal box that was concealed in a hole in the wall. It was not likely that pennies or silver dollars would be laid end to end on a rafter. The most likely place for the containment of coins, watches, rings. and knives would be a metal box. The box contained two rings and a ladies' watch which belonged to Branham. He did not identify the coins as those taken from him. Although the watch and rings were not specified in the search warrant, they were identified as items that had been stolen

APPENDIX "A"

from the Branham home. Their seizure and introduction into evidence was legal.

> ". . . While engaged in a legitimate search under a search warrant describing specific articles, it is proper to seize stolen or contraband property, or property constituting the fruits of the crime or instrumentalities of the crime, though the latter are not described in the warrant." *Jones* v. *Commonwealth,* Ky., 416 S.W.2d 342 (1967).

The metal box, nestled among the cobwebs in the rafters, contained: 27 men's wrist watches, 38 ladies' wrist watches, 7 pocket knives, 7 men's rings, 22 ladies' rings, 6 gold chains, 5 watch bands, 1 gold belt buckle, and various other items. The officer who conducted the search testified:

> "Q. Can you point to one single item that made you think that it was taken from the Branham residence, other than the fact it was concealed?
>
> A. That . . . the fact that it was concealed, there were watches in there, there were knives in there, I knew that there had been some watches taken, I believe there had been some knives taken also from the Branham home, and that was the reason we was there, to look for those items stolen from his home."

A review of the record before this court shows:

1. That Calvin R. Lytle, as magistrate of the 2nd

APPENDIX "A"

Magisterial District, issued the warrant in his official capacity as magistrate. He was not acting as judge of the Rowan Quarterly Court.

2. That Magistrate Lytle was qualified to issue the search warrant.

3. That the two rings and the watch belonging to Branham and seized as a result of the search warrant were properly admitted in evidence.

The judgement is affirmed.

All concur.

ATTORNEY FOR APPELLANT:

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ATTORNEYS FOR APPELLEE:

ED W. HANCOCK,
Attorney General

VICTOR FOX,
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

APPENDIX "B"

MANDATE

THE COMMONWEALTH OF KENTUCKY,

THE COURT OF APPEALS

75 TERM—MARCH 21, 1975

RALPH STEPHENS ..... APPELLANT

VS:

APPEAL FROM A JUDGMENT OF THE MONTGOMERY CIRCUIT COURT INDICTMENT 74-53, FILE NO. 74-1157

COMMONWEALTH OF KENTUCKY ..... APPELLEE

The Court being sufficiently advised, it seems there is no error in the judgement herein.

It is therefore considered that said judgement be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A COPY—Attest:

/s/ Frances Jones Mills, C.C.A.
FRANCES JONES MILLS, C.C.A.
By _____, D. C.

ISSUED MAY 23, 1975
APPELLANT'S PETITION FOR REHEARING DENIED—5/23/75

APPENDIX C

MONTGOMERY CIRCUIT COURT
21ST JUDICIAL DISTRICT

COMMONWEALTH OF KENTUCKY ..... PLAINTIFF

VS:

INDICTMENT NO. 74-53
INDICTMENT
KRS 433.180
(2-10) ( )

RALPH STEPHENS (Stevens) ..... DEFENDANT

The Grand Jury charges:

BREAKING AND ENTERING

On or about the 6 day of April 1974 in Montgomery County, Kentucky, the above-named defendant, feloniously broke and entered the dwelling house of Les Branham with the intent to steal therefrom, against the peace and dignity of the Commonwealth of Kentucky.

WITNESSES: Les Branham
Det. Babe Howard
Mivory Spencer

A TRUE BILL
/s/ Thos. P. Sutton
Foreman

APPENDIX D

MONTGOMERY CIRCUIT COURT
INDICTMENT NO. 74-53

COMMONWEALTH OF KENTUCY ..... PLAINTIFF

VS: MOTION TO SUPPRESS EVIDENCE

RALPH STEPHENS ..... DEFENDANT

1. The defendant Ralph Stephens moves the Court to suppress as evidence all items seized under a search warrant dated July 18, 1974 issuing from the Rowan Quarterly Court and signed by Calvin R. Lytle, identified as Magistrate, District No. 2, Rowan County for the following reasons:

2. Calvin R. Lytle, as Magistrate, District No. 2, Rowan County, had to authority to issue the search warrant.

3. The affidavit filed with the search warrant is insufficient to establish probable cause for the issuance of such warrant.

4. Articles seized from the residence of the defendant were not those enumerated in the search warrant.

5. The location of the residence and premises described in the search warrant were not within Magistrate District No. 2, Rowan County.

WHITE AND PECK
Attorneys at Law
Mt. Sterling, Kentucky
ATTORNEYS FOR DEFENDANT

Lewis A. White
By: _____

APPENDIX E

THE COMMONWEALTH OF KENTUCKY
IN THE ROWAN QUARTERLY COURT
OF MOREHEAD, KENTUCKY

SEARCH WARRANT

To any policeman, sheriff, constable or other peace officer of the Commonwealth of Kentucky:

Proof by affidavit having this day been made before me by DET. BABE HOWARD Commonwealth of Kentucky, Bureau of State Police, a peace officer of Commonwealth of Kentucky, Bureau of S. that there is probable and reasonable cause for the issuance of this search warrant as set forth in the affidavit attached hereto and made a part hereof as if fully set out herein; you are commanded to make immediate search of the premises known and numbered as RALPH STEPHENS residence, Bull Fork, Rowan County, Kentucky, and more particularly described as follows: Beginning at the intersection of Kentucky Highway #32 and the Bull Fork Road, travel South on the said Bull Fork Road for a distance of 2.3 miles South to a white frame dwelling house with a green metal roof and a front porch. Said dwelling house is on the right side of the said Bull Fork Road and used by RALPH STEPHENS as a residence. Said dwelling house is situated in Rowan County, Kentucky, approximately seven (7) miles from Morehead, Kentucky.

and/or (a) vehicles (s) described as a gold colored 1971 Buick 2-door bearing 1974 Kentucky license 835-888.

APPENDIX E

and/or the person(s) of RALPH STEPHENS or such other person or persons who may appear to be in control of the within described premises and automobile.

for the following personal property, to wit: One 400 lb. floor safe, brand unknown, one muzzle loading rifle, one Westfield .20 ga. pump shotgun, one Golden Spike Winchester .30.30 rifle, one .22 cal. Winchester magnum rifle, one Mossenburg and Sons .12 ga. single barrel lever action shotgun, one Hopkins and Allen .12 ga. single barrel shotgun, one Little Scout .22 cal. rifle, one Springfield .22 cal. rifle, one Marlin .22 cal. rifle, one Smith & Wesson .357 magnum revolver, serial #8049, one Smith & Wesson .38 cal. snub-nose revolver, serial #J57403, six men's suits, assorted colors and sizes, rare type coins ranging from pennies to silver dollars.

and if you find same or any part thereof, to bring it forthwith before me or any other court in which the offense in respect to which the property or things taken is triable, or retain such property in your custody subject to the order of such court.

Witness my hand the 18th day of July, 1974.

/s/ Calvin R. Lytle

Judge, Magistrate District No. 2,
Rowan Court County,
Morehead, Kentucky

APPENDIX E

Executed this 18 day of July, 1974, by searching the within named premises, including the within named automobile. Several burglarious tools were found in the front and rear of said automobile, and seized.

/s/ C. A. Thomas

DET. SGT. C. A. THOMAS, KSP

APPENDIX F

MONTGOMERY CIRCUIT COURT
INDICTMENT NO. 74-53

RALPH STEPHENS ..... APPELLANT

VS:
AGREED STATEMENT PURSUANT TO RCr. 12.72

COMMONWEALTH OF KENTUCKY ..... APPELLEE

* * * *

Appellant Ralph Stephens was indicted in the Montgomery Circuit Court (Indictment No. 74-53, Exhibit #1) charged with feloniously breaking and entering the dwelling house of Les Branham with the intent to steal therefrom. A jury trial in the Montgomery Circuit Court held October 7, 1974 resulted in a verdict of guilty and punishment was fixed at confinement in the penitentiary for a period of six years. (Exhibit #6).

On October 8, 1974 the appellant filed and served a motion and grounds for a new trial (Exhibit #7) and on October 24, 1974 the court overruled appellant's motion and grounds for a new trial and entered judgment against the appellant pursuant to the jury verdict. (Exhibit #8). The appellant was permitted to remain on bail pending appeal.

On October 31, 1974 appellant filed his notice of appeal in the Montgomery Circuit Court (Exhibit #9).

After indictment but prior to trial and on October 1,

APPENDIX F

1974, appellant filed a motion to suppress as evidence (Exhibit #4) articles seized under a search warrant dated July 18, 1974 issuing from the Rowan Quarterly Court and signed by Calvin R. Lytle, identified as Magistrate, District No. 2, Rowan County (Exhibit #2)

A hearing upon this motion to suppress was held on October 4, 1974. At this hearing there was introduced the testimony of Calvin R. Lytle, Magistrate, District No. 2, Rowan County, Kentucky, Clyde Thomas, a detective sergeant with the Kentucky State Police, Alonzo Hensley, a detective sergeant with the Kentucky State Police and Babe Howard, another detective sergeant with the Kentucky State Police. (Exhibit #5)

The following facts were established by the testimony introduced at this hearing:

On July 18, 1974, the date when he signed the search warrant (Exhibit #2) and signed the jurat to the affidavit of Babe Howard upon which the search warrant was issued (Exhibit #3), Calvin R. Lytle was the duly elected, qualified and acting Magistrate for Magistrate District No. 2, Rowan County, Kentucky, but was not at that time or any other time the Judge of Rowan County, Kentucky or presiding judge of the Rowan Quarterly Court.

Magistrate Lytle was and is a merchant by occupation and is not an attorney.

A number of articles were seized from the residence of the appellant pursuant to the search warrant which were not listed on the search warrant and of these articles a

APPENDIX F

ladies wrist watch and two ladies rings were identified by Les Branham at the trial as having been taken from his residence. No property listed on the search warrant and affidavit for the search warrant as stolen property was found in appellant's home or seized pursuant to the search warrant.

When this case was called for trial on October 7, 1974, the trial court overruled appellant's motion to suppress the evidence seized under the search warrant of July 18, 1974 and upon the trial of the case permitted over appellant's objection the introduction into evidence of the ladies wrist watch and two rings seized under the search warrant and identified by Les Branham as having been taken from his residence.

Without the introduction into evidence of the ladies wrist watch and two rings seized under the search warrant the appellant would have been entitled to a directed verdict since no other proof was introduced connecting him with the offence alleged in the indictment.

It is the position of the appellant upon this appeal that the trial court erred in overruling his motion to suppress the evidence seized under the search warrant issued from the Rowan Quarterly Court dated July 18, 1974 (Exhibit #2) because (1) Calvin R. Lytle as Magistrate, District No. 2, Rowan County, Kentucky, had no legal authority to sign or issue the search warrant, (2) nor, not being an attorney, was he qualified to do so, and (3) further the court erred in permitting the introduction into evidence of the watch and two rings seized pursuant to the search

APPENDIX F

warrant since they were not described or mentioned in the search warrant and none of the articles listed in the search warrant as alleged stolen property was found in appellant's residence or seized under the search warrant.

To submit this issue on appeal there are attached the following exhibits, which together with this statement shall constitute the record to be certified to the Court of Appeals of Kentucky in this appeal:

Exhibit #1, Indictment No. 74-53, Montgomery Circuit Court

Exhibit #2, Search warrant dated July 18, 1974 issued from the Rowan Quarterly Court and signed by Calvin R. Lytle, Magistrate, District No. 2, Rowan County.

Exhibit #3, Affidavit in Support of search warrant dated July 18, 1973 signed by Babe Howard and sworn to before Magistrate Calvin R. Lytle.

Exhibit #4, Motion to suppress evidence.

Exhibit #5, Transcript of evidence heard at suppression hearing.

Exhibit #6, Jury verdict.

Exhibit #7, Motion and Grounds for a New Trial.

Exhibit #8, Judgment dated October 24, 1974.

APPENDIX F

Exhibit #9, Notice of Appeal filed October 31, 1974. This November 15, 1974.

WHITE AND PECK
Attorneys at Law
Mt. Sterling, Kentucky

ATTORNEYS FOR APPELLANT

/s/ Lewis A. White
By: _____

/s/ James E. Clay
JAMES E. CLAY
Commonwealth's Attorney
21st Judicial District

Attorney for Appellee

The foregoing Agreed Statement Pursuant to RCr. 12.72 is approved by the Court and hereby certified to the Court of Appeals as the record on appeal.

This November 15, 1974.

/s/ Caswell P. Lane
Judge, Montgomery Circuit Court

/s/ Paula Duncan
Clerk, Montgomery Circuit Court

APPENDIX G

MONTGOMERY CIRCUIT COURT
MT. STERLING, KENTUCKY,
OCTOBER 24, 1974

COMMONWEALTH OF KENTUCKY ... PLAINTIFF

VS:

JUDGMENT
ON INDICTMENT NO.(s): 74-53
ON THE CHARGE(s) of:

RALPH STEPHENS ... DEFENDANT

This 24th day of October, 1974, the defendant Ralph Stephens appeared in open court with his attorney, Lewis A. White, and Neil R. Maxey appeared as attorney for the Commonwealth, the court informed the defendant that he has been found guilty of the crime of breaking and entering by (the court) (a jury) on his plea of (not) guilty, the court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and no sufficient cause was shown why judgment should not be pronounced, and it is therefore by the court: ADJUDGED that the defendant is guilty of the crime of breaking and entering and his punishment is fixed at confinement in the State Penitentiary for a period of six years at hard labor; and it is FURTHER ORDERED AND ADJUDGED that the County Sheriff shall deliver the defend-

APPENDIX G

ant to the custody of the Department of Corrections hereunder at such location within this state as the Department shall designate.

After fixing sentence, the court informed the defendant of his right to appeal to the Court of Appeals of Kentucky with the assistance of counsel, and of his right to a free appeal, including free counsel and free transcript if he could not afford same. Pending appeal bail is continued.

/s/ Caswell P. Lane
Circuit Judge
Montgomery Circuit Court

Attested as a true copy of Judgment entered on the 24th day of October, 1974, in Order Book 15, page 557, and signed by

CASWELL P. LANE
Circuit Judge
/s/ Paula Duncan
Clerk

APPENDIX H

MONTGOMERY QUARTERLY COURT

COMMONWEALTH OF KENTUCKY ..... PLAINTIFF

VS: WARRANT OF ARREST ON COMPLAINT

RALPH STEPHENS ..... DEFENDANT

TO ALL PEACE OFFICERS IN THE COMMONWEALTH OF KENTUCKY:

You are hereby commanded to arrest Ralph Stephens and bring him forthwith before the Judge of the Quarterly Court of Montgomery County, Kentucky (or, if he be absent or unable to act, before the nearest available magistrate), to answer a complaint made by Babe Howard Charging him with the offense of housebreaking.

Issued at Mt. Sterling, Montgomery County, Kentucky, this 23rd day of July, 1974.

/s/ Harry G. Hoffman II
Judge, Montgomery
Quarterly Court

By; _____ Clerk

The defendant may be admitted to bail in the sum of $10,000.00 this 23rd day of July, 1974.

/s/ Harry G. Hoffman II
Judge, Mongomery
Quarterly Court

By; _____ Clerk

APPENDIX I

COURT OF APPEALS OF KENTUCKY
FILE NO. 74-1157

RALPH STEPHENS ..... **APPELLANT**

VS:
APPEAL FROM MONTGOMERY CIRCUIT COURT
HON. CASWELL P. LANE, JUDGE

COMMONWEALTH OF KENTUCKY ..... **APPELLEE**

ADMISSION OF ERROR

MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTION PRESENTED

DID CALVIN R. LYTLE, MAGISTRATE, DISTRICT NO. 2, ROWAN COUNTY, KENTUCKY, HAVE AUTHORITY TO ISSUE A SEARCH WARRANT FROM THE ROWAN QUARTERLY COURT?

STATMENT OF THE CASE

This appeal was submitted upon agreed statement pursuant to RCr 12.72.

ARGUMENT

Appellee is constrained to concede error and admits that a magistrate, as defined by RCr 1.06 cannot perform judicial functions except in the court presided over by him.

Since the Commonwealth confesses error in the is-

APPENDIX I

suance of the search warrant, the other questions raised by appellant are, appellee submits, moot.

Respectfully submitted,

ED W. HANCOCK
ATTORNEY GENERAL

/s/ Victor Fox
VICTOR FOX
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601

JAMES E. CLAY
COMMONWEALTH'S ATTORNEY
21st JUDICIAL DISTRICT

COUNSEL FOR APPELLEE

LIBRARY
SUPREME COURT, U. S.

FILED
SEP. 17 1975
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-267

RALPH STEPHENS ..... PETITIONER

V.

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-267

RALPH STEPHENS ..... PETITIONER

V.

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of Kentucky, reported in 522 S.W.2d 181 (1975), is printed as Petitioner's Appendix A.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

WHETHER OR NOT THE COURT OF APPEALS OF KENTUCKY ERRED IN ITS OPINION APPROVING THE ACTION OF THE TRIAL COURT IN PERMITTING THE INTRODUCTION INTO EVIDENCE OF THE WATCH AND TWO RINGS SEIZED PURSUANT TO THE SEARCH WARRANT WHEN THE WATCH AND TWO RINGS WERE NOT DESCRIBED IN THE SEARCH WARRANT BUT WERE IN "PLAIN VIEW"?

CONSTITUTIONAL AMENDMENT INVOLVED

The Fourth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct.

STATEMENT OF THE FACTS

Agreed Statement pursuant to Kentucky RCr 12.72. (Petitioner's Appendix F).

ARGUMENT

THE COURT OF APPEALS OF KENTUCKY DID NOT ERR IN ITS OPINION APPROVING THE ACTION OF THE TRIAL COURT IN PERMITTING THE INTRODUCTION INTO EVIDENCE OF THE WATCH AND TWO RINGS SEIZED PURSUANT TO THE SEARCH WARRANT WHEN THE WATCH AND TWO RINGS WERE NOT DESCRIBED IN THE SEARCH WARRANT BUT WERE IN "PLAIN VIEW."

Respondent submits the seizure was permissible under the doctrine of "plain view."

The police were in petitioner Stephens' home in obedience to a search warrant. The warrant described numerous items of personal property including "rare type coins ranging from pennies to silver dollars." (Petitioner's Appendix E). While carrying out the search, various items, such as expensive silverware, jewelry, stereo equipment, luggage and large amounts of costume jewelry were observed throughout the house. (Petitioner's Appendix F, Exhibit # 5, p. 22).

The three seized items were in a metal box which was located upstairs behind a hole cut in the wall, stuck over the rafters. When opened the metal box contained a number of watches, rings, knives and coins. (Petitioner's Appendix F, Exhibit #5, p. 16). The metal box and the contents thereof were seized.

The primary requisite for the "plain view" doctrine is that the officer has a right to be where he observes evidence in plain view. For application of the doctrine, the discovery must be inadvertent, that is the police not know in advance that they will find the particular item or items. *United States* v. *Cooks,* 493 F.2d 668 (7th Cir. 1974); *United States* v. *Garotto,* 476 F.2d 1009 (6th Cir. 1973); *United States* v. *Smollar,* 357 F.Supp. 628 (S. Dist. N.Y. 1972). Mr. Justice Stewart in *Coolidge* v. *New Hampshire,* 403 U.S. 443 at 466, 29 L.Ed.2d 564, 91 S.Ct. 2022, wrote:

> "The doctrine serves to supplement the prior justification, — . . . — and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent

to the police that they have evidence before them;"

The officer, in obedience to the warrant had a right to reach into the hole, remove the box and to open it. Coins were listed in the warrant and it was reasonble to think the box might contain coins, as indeed it did. Cf. *United States* v. *Gray,* 484 F.2d 352 (6th Cir. 1973) cert. den. 414 U.S. 1158. The discovery of 27 men's wristwatches, 38 wristwatches, 7 pocket knives, 7 men's rings, 22 ladies' rings, 6 gold chains, 5 watchbands, 1 gold belt buckle, 45 pennies and 37 pieces of foreign coins, copper, brass and silver was inadvertent. (Petitioner's Appendix F, Exhibit #5, pp. 18, 20).

The officer, testifying at the suppression hearing, stated he:

> ". . . knew that they was probable stolen — I knew the way those items were concealed, the amount of them, they was something wrong with them." (Petitioner's Appendix F, Exhibit #5, p. 20).

It was immediately apparent to him that this represented evidence, especially when the box contained coins and coins were listed in the warrant. *Coolidge,* supra.

Police, lawfully present, are not required to close their eyes and walk out and leave items believed stolen.

Petitioner points out that none of the property described in the search warrant was seized by the officers. However, even if the item described in a warrant is not found, seizure of other items is not necessarily unlawful. *United States* v. *Various Gambling Devices,* 478 F.2d 1194 (5th Cir. 1973).

CONCLUSION

Respondent submits the police were there legally, that they had a right to be where the items came into plain view inadvertently and that it was immediately apparent the items constituted evidence. The seizure was lawful and the Court of Appeals of Kentucky did not err in its opinion, therefore respondent respectfully requests this Court to deny the petition, because the opinion of the Court of Appeals of Kentucky was correct in that petitioner was not deprived of his Fourth Amendment rights.

Respectfully submitted,

ED W. HANCOCK
ATTORNEY GENERAL

/s/ Carl T. Miller, Jr.
ASSISTANT DEPUTY
ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I, Carl T. Miller, Jr., one of counsel for respondent, hereby certify that the foregoing Brief was served on petitioner by depositing three copies of same in the United States mail, first class postage prepaid, on September 16, 1975, addressed to Hon. Lewis A. White, White & Peck, 26 Broadway, Mt. Sterling, Kentucky 40353, Counsel for Petitioner.

Carl T. Miller, Jr.
Assistant Deputy Attorney General
Commonwealth of Kentucky

Counsel for Respondent